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No. 80-1345

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

KAISER STEEL CORPORATION,
Petitioner,

v.

JULIUS MULLINS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONER KAISER STEEL CORPORATION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a party to a contract provision, which he believes violates federal antitrust and labor laws and which for years no one had attempted to enforce, may raise the defense of illegality in an action brought for specific performance of the allegedly illegal provision.

2. Whether the Labor-Management Relations Act, which in Section 8(e) provides that certain types of contract clauses are "unenforcible and void," is properly construed as both granting federal courts jurisdiction to enforce collective bargaining agreements and precluding federal courts from deciding whether the clauses they are called upon to enforce violate Section 8(e).

3. Whether a federal court may award attorneys' fees to a plaintiff in an action brought to enforce a collective bargaining agreement when no applicable statute authorizes such an award.*

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* The following were parties to the proceedings in the Court of Appeals: Kaiser Steel Corporation (appellant) and Julius Mullins, John J. O'Connell, and Paul R. Dean, in their capacities as trustees of the United Mine Workers of America Health and Retirement Funds (appellees). Harrison Combs has since replaced Julius Mullins as a trustee.

The Henry J. Kaiser Family Foundation has a 17.1% ownership interest in Kaiser Steel Corporation. Kaiser Steel Corporation has no other parent corporation or affiliate and no partially owned subsidiaries.

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BRIEF FOR PETITIONER KAISER STEEL CORPORATION

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 642 F.2d 1302 and appears, in slip opinion form, as Appendix A to the Petition for a Writ of Certiorari.[1] The order of the district court from which appeal was taken and the district court's Memorandum Opinion, which is reported at 466 F. Supp. 911, appear as Appendix B to the Petition. The judgment of the Court of Appeals appears as Appendix C to the Petition. The orders of the Court of Appeals denying Kaiser Steel Corporation's petition for rehearing and suggestion for rehearing en banc appear as Appendix D to the Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on September 17, 1980. 642 F.2d 1302; Pet. App. 1a. A

[1] References to the Appendices to the Petition for a Writ of Certiorari are cited herein as "Pet. App. ——," and references to the Joint Appendix filed simultaneously herewith are cited herein as "J.A. ——." References to the Joint Appendix filed in the Court of Appeals are cited herein as "C.A.J.A. ——."

timely suggestion for rehearing en banc was denied, by a vote of 7 to 4, on November 12, 1980. 642 F.2d 1302; Pet. App. 84a. A timely petition for a writ of certiorari was filed on February 10, 1981. The petition was granted by order dated May 4, 1981. J.A. 79. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves Sections 8(e) and 301 of the Labor-Management Relations Act, 29 U.S.C. §§ 158(e) and 185 (1976); Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2 (1976); and Sections 502(a) and 502(g) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132(a) and 1132(g) (1976). These statutory provisions are set forth in Appendix E to the Petition.

STATEMENT OF THE CASE

This is an appeal from a summary judgment granting specific performance of one provision in the National Bituminous Coal Wage Agreement of 1974, a collective bargaining agreement between hundreds of coal producers, including numerous steel companies such as Kaiser Steel Corporation ("Kaiser Steel"), and the United Mine Workers of America ("UMW").[2] That provision, commonly referred to as the "purchase-of-coal clause," required signatory employers to pay a penalty or surcharge whenever they purchased coal from non-UMW coal producers. Kaiser Steel alleged that the purchase-of-coal clause violates the federal antitrust and labor laws. The lower courts held that that allegation, even if true, did not state a good defense. The basic issue in the case is whether a federal court will provide specific performance of a contract clause that is alleged to violate federal law.

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[2] Kaiser Steel does not dispute any of the facts on which Respondents based their motion for summary judgment (J.A. 67-73). Kaiser Steel is entitled to have its version of all other facts presumed. *E.g., Bishop v. Wood*, 426 U.S. 341, 347 (1976).

History of the Dispute

This case arises out of a coal industry labor dispute that is decades old. Since at least the 1940s, the UMW has included in its collective bargaining agreements provisions designed to deter or bar trade in coal mined by coal producers whose employees are represented by another union or no union at all. During the 1940s and 1950s, the UMW included in some of its agreements with coal mine operators a "no subcontracting" clause that permitted signatory UMW operators to buy non-UMW coal only if their own employees could not produce comparable coal. C.A.J.A. 47, 570. The 1958 agreement included a "protective wage" clause that prohibited signatory UMW operators from purchasing coal from any operator who paid less than UMW wages but left signatories free to buy coal from non-UMW operators who paid wages and benefits at least as high as those paid under the UMW agreement. C.A.J.A. 477, 570.

The purchase-of-coal clause was first included in the 1964 agreement, and the UMW has insisted on retaining the clause in all its subsequent agreements. C.A.J.A. 477-78. That clause requires employers to pay to the trustees of the UMW health and retirement funds ("Respondents") a penalty or surcharge on all coal they purchase from non-UMW producers. Pet. App. 3a. Like its predecessors, the purchase-of-coal clause is intended to aid the UMW in its efforts to organize non-UMW coal producers by inducing UMW signatories not to purchase coal from—and thus to boycott—those producers. Pet. App. 35a-36a; C.A.J.A. 334, 471.[3] Unlike its predeces-

[3] This purpose has been made explicit in negotiations concerning the clause. During negotiations in 1968 and 1971, for example, the president of the UMW, who was also a trustee of the UMW's health and welfare funds, said that the UMW insists on the penalty clause because it gives the union a lever to use in its efforts to organize non-UMW producers. C.A.J.A. 470-71. The president of the UMW also made clear during negotiations over the recently-ratified 1981 agreement that the purpose of the purchase-of-coal clause is to discourage purchases of non-UMW coal.

sors, however, the purchase-of-coal clause penalizes and thus deters purchases of non-UMW coal even by employers who cannot produce comparable coal themselves and even from non-UMW producers who pay wages and benefits higher than those paid under the UMW agreements. Pet. App. 3a; C.A.J.A. 478.[4]

Steel companies negotiating with the UMW, including Kaiser Steel, have consistently objected to the purchase-of-coal clause as an overbroad and illegal restraint on their purchases of non-UMW coal.[5] For a time, they succeeded in resisting the UMW's efforts to impose the clause on them; until 1971, the UMW agreements left the steel companies free to purchase non-UMW coal for use in their manufacture of steel. C.A.J.A. 478-79. But in 1971, after a long strike, the steel companies yielded to the UMW's demands. C.A.J.A. 479. The pen-

[4] The amount of the payments called for by the purchase-of-coal clause is not related to any differences between UMW and non-UMW wage and benefit levels, to the amount of work performed by an individual employer's UMW employees or by UMW employees as a whole, or to the benefits expected to be paid to or accrued by those employees. J.A. 31-32; C.A.J.A. 280-81, 296-97, 464-65, 471. More important, the funds do not depend on the penalty payments as a source of revenue; on the contrary, the financial needs of the funds are expected to be fully satisfied by the separate contract provisions requiring signatories to make contributions to the funds for each ton of coal produced, and each hour of work performed, by their UMW employees. C.A.J.A. 296, 464-65, 471; *see* p. 6, *infra*. The funds' beneficiaries are not dependent on the penalty payments called for by the purchase-of-coal clause; wholly apart from the obligations to make contributions to the funds, the 1978 and 1981 agreements obligate signatory employers to guarantee all benefits payable by the funds to their beneficiaries.

[5] By penalizing purchases of non-UMW coal, the penalty clause benefits UMW signatory employers who sell more coal than they buy; the clause gives them an advantage, equal to the amount of the penalty, in competing with non-UMW producers for sales to other UMW signatories. By the same token, however, a UMW signatory like Kaiser Steel who buys more coal than it sells is likely to be injured by the penalty clause; it often must either pay a penalty on each ton that it buys from a non-UMW signatory or buy higher-priced coal from a UMW signatory.

alty clause was made a part of the 1971 collective bargaining agreement, and it has been included in each subsequent agreement—the 1974 agreement here at issue, the 1978 agreement, and the recently-ratified 1981 agreement.[6]

Not surprisingly, the penalty clause and its predecessors have led to almost continuous litigation before the federal courts and the National Labor Relations Board ("NLRB"). Some cases have raised the question whether such clauses are illegal hot cargo provisions.[7] In other cases, brought under the antitrust laws, it has been alleged that the clauses are used by the UMW in concert with some coal mine operators to carry out boycotts of non-UMW operators.[8] In recognition of the dubious legality of the penalty clause, the UMW has insisted since 1971 on including in its agreements a provision that would require employers to enter into negotiations over a possible substitute for the penalty clause in the event that the clause is held to be unlawful in a final, unappealable decision of a court. J.A. 32; C.A.J.A. 44, 491.

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[6] The penalties imposed by the purchase-of-coal clause have increased over the years. Under the 1971 agreement, the penalty was $1.00 per ton for the first year and increased at six month intervals up to $1.20 per ton by the end of the term of that agreement. C.A.J.A. 478. The penalty under the 1974 agreement was $1.182 per ton for 1975 (the first year of the agreement), $1.456 for 1976, and $1.55 for 1977. *Id.* Under the 1978 agreement, it was $1.695 for the first year, $1.90 for the second and $1.895 for the third. *Id.* Under the 1981 agreement now in effect, the penalty will be $2.088 for the first year, $2.223 for the second and $2.236 for the third.

[7] *E.g., Riverton Coal Co. v. UMW*, 453 F.2d 1035 (6th Cir.), *cert. denied*, 407 U.S. 915 (1972); *International Union, UMW v. NLRB*, 399 F.2d 977 (D.C. Cir. 1968); *Lewis v. NLRB*, 350 F.2d 801 (D.C. Cir. 1965).

[8] *E.g., UMW v. Pennington*, 381 U.S. 657 (1965); *South-East Coal Co. v. Consolidation Coal Co.*, 434 F.2d 767 (6th Cir. 1970); *Tennessee Consolidated Coal Co. v. UMW*, 416 F.2d 1192 (6th Cir. 1969), *cert. denied*, 397 U.S. 964 (1970).

Kaiser Steel Corporation

Kaiser Steel operates a steel mill in California and coal mines in Utah and New Mexico. It uses almost all of the coal produced by its mines in its steel manufacturing process. That process requires a blend of high-volatile and mid-volatile coking coals. Kaiser Steel's coal mines, however, produce only high-volatile coal, so Kaiser Steel has had to purchase its needed mid-volatile coal from another coal producer. C.A.J.A. 293, 480.

Since 1959, Kaiser Steel has purchased virtually all of its mid-volatile coal requirements from Mid-Continent Coal and Coke Company ("Mid-Continent") in Colorado. C.A.J.A. 293, 480. The UMW has repeatedly tried to organize Mid-Continent's employees and become their collective bargaining representative, but its efforts have thus far been unsuccessful. C.A.J.A. 293-94, 333-34. Mid-Continent's coal mining employees are represented by another coal mining union, and its wages and fringe benefits have consistently been higher than those provided under UMW collective bargaining agreements. C.A.J.A. 294, 329-33, 480-81.

Kaiser Steel has been a UMW signatory since the 1940s. The UMW collective bargaining agreements have over the years addressed myriad aspects of the employment relationship between signatories and their UMW employees. The 1974 agreement at issue in this case includes dozens of sections that set out the terms of compensation for Kaiser Steel's UMW employees. Among the other obligations it imposed on Kaiser Steel, the agreement required Kaiser Steel to make payments to Respondents based on the hours worked and tons of coal produced by Kaiser Steel's employees. Pet. App. 3a. Kaiser Steel made all of these payments. Pet. App. 6a.[9]

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[9] Kaiser Steel made contributions to Respondents pursuant to the 1974 agreement totaling almost $9 million, approximately $2½ million more than the health and retirement fund benefits accrued by its employees and their dependents during that period. C.A.J.A. 479.

From the outset, however, Kaiser Steel and other steel companies refused to pay the penalties called for by the purchase-of-coal clause on the coal they purchased from non-UMW coal producers or to account to Respondents for their purchases of non-UMW coal.[10] Kaiser Steel believed that the purchase-of-coal clause was illegal and unenforceable and that compliance with the clause might subject it to antitrust suits brought by non-UMW coal producers.

Although both the union and Respondents were fully aware of the widespread refusal to comply with the purchase-of-coal clause and knew specifically at least since 1971 that Kaiser Steel regularly purchased coal from Mid-Continent without making the penalty payments,[11] neither sought to enforce the clause while the 1974 agreement was in effect. For their part, Respondents feared that the clause was illegal and that efforts to enforce it would subject them to a "rash of the antitrust suits." [12]

The Proceedings Below

Four months after expiration of the 1974 agreement, Respondents abandoned their policy of nonenforcement and commenced a series of lawsuits, beginning with this case, seeking specific performance of the purchase-of-coal clause. The complaint in this case set forth a single

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[10] The amount of money that Kaiser Steel was called upon to pay by the purchase-of-coal clause in the 1974 agreement was one-sixth of the amount Kaiser Steel paid to the funds pursuant to that agreement based on coal produced by its employees. *See* Brief for Appellees, August 10, 1979, Appendix A at A-1; C.A.J.A. 479.

[11] Pet. App. 50a; C.A.J.A. 294 & n.5, 467-68, 470, 652-53 & n.3. In 1971, the president of the UMW—who was simultaneously serving as a trustee of the UMW health and retirement funds—urged Kaiser Steel to cease purchasing non-UMW coal from Mid-Continent. C.A.J.A. 468, 470. Over the years, other high UMW officials have repeatedly complained to Kaiser Steel about its purchases from Mid-Continent. C.A.J.A. 467-68, 471.

[12] Memorandum from the Chairman of the Board of Trustees of the UMW Health and Retirement Funds, July 19, 1974; *see* Reply Brief for Appellant, September 19, 1979, at 8 n.12.

cause of action—the assertion that Kaiser Steel breached the 1974 agreement in effect between 1974 and 1977 by failing to make the payments and reports called for by the purchase-of-coal clause. Respondents alleged jurisdiction under Section 301 of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 185, and Section 502 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132. J.A. 11.

Kaiser Steel defended the suit on the grounds that the purchase-of-coal clause violated Section 8(e) of the LMRA, 29 U.S.C. § 158(e), and Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2; that payment of the sums called for by that clause would be illegal; and that the clause is void and unenforceable. Pet. App. 73a; J.A. 59. Kaiser Steel also denied that the court had jurisdiction under ERISA. J.A. 57; C.A.J.A. 325 n.44.

Respondents moved for summary judgment on the ground that, even if illegal, the purchase-of-coal clause should be enforced. The district court granted Respondents' motion and, without briefing or discussion, ordered Kaiser Steel to pay Respondents' attorneys' fees. Pet. App. 80a.[13]

On appeal, the United States Court of Appeals for the District of Columbia Circuit affirmed the summary judgment. 642 F.2d at 1320; Pet. App. 34a. In an opinion by Judge Mikva (joined by District Court Judge Flannery), the panel held that the district court properly refused to entertain Kaiser Steel's defense of illegality and that Kaiser Steel's only recourse, long since foregone, was to have brought a declaratory judgment action against the union or to have filed a charge with the NLRB at the outset of the contract period challenging the lawfulness of the purchase-of-coal clause. 642 F.2d at 1312-13, 1317; Pet. App. 18a-19a, 27a-28a. The panel also upheld the district court's award of attorneys' fees on the

[13] The court denied, but did not reach the merits of, Kaiser Steel's cross-motion for summary judgment, in which Kaiser Steel argued that the penalty clause on its face violated Section 8(e) and was therefore "unenforcible and void." C.A.J.A. 278.

ground that Section 502 of ERISA, which authorizes fee awards, and Section 301 of the LMRA, the statute on which Respondents based their claim below but which does not authorize fee awards, are not "so surgically discrete that an action to compel welfare fund contributions required by the terms of a collective bargaining agreement cannot be maintained under both sections." 642 F.2d at 1320; Pet. App. 34a.

Circuit Judge Wilkey dissented from both holdings, finding "no reason in law or logic why any court should enforce a contract clause which plainly violates the law specifically designed to prohibit such clauses" and no statutory authority for the fee award. 642 F.2d at 1320, 1335; Pet. App. 35a, 67a. With four judges dissenting, the Court of Appeals denied Kaiser Steel's suggestion for rehearing en banc. Pet. App. 84a.

SUMMARY OF ARGUMENT

The issue in this case is whether a federal court will provide specific performance of a contract clause without considering the defense that the clause violates the antitrust and labor laws. The Court of Appeals decided the case as if the issue were whether it should "add the remedy of contract avoidance to the other forms of relief" provided by those laws. 642 F.2d at 1314; Pet. App. 22a. By failing to distinguish between "remedies" and "defenses," the court lost sight of the central question in the case—whether Respondents, who initiated this action and asked the court for relief, are entitled to the federal court remedy they seek.

I. Until this case, no court of which we are aware had ever enforced a contract provision that was alleged to be illegal without considering the merits of the illegality defense, and courts had uniformly refused to enforce provisions they found to be unlawful. The Court of Appeals in this case departed from this heretofore uniform rule.

The Court of Appeals agreed that a contract clause may not be enforced where enforcement would bring about "the precise conduct" made unlawful by federal

law, but it erroneously concluded that enforcement of the purchase-of-coal clause in this case would not have that effect. In fact, however, enforcement of the purchase-of-coal clause would have precisely the effects that both the antitrust laws and the labor laws are intended to prevent.

Moreover, the rule that courts do not act in aid of illegal contract provisions is not limited to those instances in which enforcement would require conduct that is itself illegal. It has long been the rule that courts refuse to permit a party to reap the fruits of illegal contract provisions under any circumstances or to require the payment of penalties or damages for past conduct pursuant to such provisions.

II. The Court of Appeals rejected Kaiser Steel's defense that the purchase-of-coal clause violates Section 8(e) of the LMRA on the ground that federal courts do not have jurisdiction to decide whether contract clauses they are asked to enforce violate that section. But a contract provision that violates federal law creates no enforceable rights. Thus, in order to determine whether it may enforce a contract clause, a federal court necessarily has the power to decide whether that clause violates the law.

The Court of Appeals misconstrued 8(e) of the LMRA. That section provides that hot cargo clauses, like the purchase-of-coal clause, shall be "unenforcible and void." The plain meaning of Section 8(e), its legislative history and the prior decisions of this Court make clear that courts are not to enforce such clauses and that employers may raise the illegality defense in actions brought to enforce them.

The Court of Appeals' decision also runs afoul of a more general principle, manifest in a long line of decisions, that the doctrine of primary NLRB jurisdiction does not prevent a federal court from deciding labor law issues that arise as a defense in actions properly before the court on other grounds. Indeed, if the LMRA were construed as both granting federal court jurisdiction to enforce collective bargaining agreements and precluding

federal courts from deciding whether the clauses they are called upon to enforce violate Section 8(e), it would be unconstitutional. Such a construction would impermissibly restrict the ability of the federal courts fully to resolve cases properly before them.

III. The Court of Appeals erred in awarding attorneys' fees to Respondents because no applicable statute provides for such an award. Section 301 of the LMRA does not authorize courts to award attorneys' fees, and Section 502 of ERISA does not provide jurisdiction for actions, like this one, brought to enforce a collective bargaining agreement.

ARGUMENT

In requiring Kaiser Steel to make the penalty payments called for by the purchase-of-coal clause, the Court of Appeals made two basic errors. First, it erred in holding that a federal court may enforce an illegal contract clause. Second, it erred in holding that federal courts lack jurisdiction to decide whether contract clauses they are asked to enforce violate the federal labor laws. The court also erred in affirming the award of attorneys' fees.

I. FEDERAL COURTS DO NOT LEND THEIR AID TOWARDS CARRYING OUT ILLEGAL CONTRACT PROVISIONS.

It has long been the rule that courts will not enforce illegal contracts and that an allegation that a contract provision is illegal states a good defense to an action to enforce that provision. As this Court put it in *McMullen v. Hoffman*, 174 U.S. 639, 654 (1899), "no court will lend its assistance in any way towards carrying out the terms of an illegal contract."

Courts refuse to aid plaintiffs who seek to enforce illegal agreements, not in order to benefit the defendants, but in order to protect the public interests served by laws (like the antitrust and labor laws at issue in this case) that prohibit such contract clauses, to deny plaintiffs the fruits of such illegal clauses, and to remove any incen-

tive for parties to include illegal clauses in their agreements.[14]

The rule against the enforcement of illegal contract clauses does not mean that a plaintiff who sues on a *lawful* contract provision opens himself up to every conceivable defense based on illegalities unrelated to the provision he seeks to enforce.[15] To the contrary, courts often enforce one provision of a contract even though some *other* provision or a different agreement is alleged to be illegal.[16] But when a plaintiff's case depends on proof of an *illegal* contract provision, it is open to the defendant to establish that that provision is unlawful and thus not a valid instrument upon which recovery may be based.[17]

Kelly v. Kosuga, 358 U.S. 516 (1959), illustrates these principles. In *Kelly*, the Court was asked to enforce a *lawful* agreement for the sale of onions. After taking delivery of the onions, the defendant refused to pay for them on the ground that a *separate* agreement not to deliver onions to the futures market (the

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[14] *See Hurd v. Hodge*, 334 U.S. 24, 34-35 (1948); *Weil v. Neary*, 278 U.S. 160, 173-74 (1929); *Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U.S. 227, 262-64 (1909); *McMullen v. Hoffman*, 174 U.S. 639, 669-70 (1899); 14 Williston, Contracts § 1630A at 22-23 (3d ed. W. Jaeger 1972).

[15] As the Court explained in *D. R. Wilder Mfg. Co. v. Corn Prod. Ref. Co.*, 236 U.S. 165, 177 (1915), a contract that is "inherently legal" cannot "be rendered illegal by considering in connection with it something which there is no right to consider at all"; a court has no "right to import into a legal and valid contract elements of wrong which there [is] no right to consider . . . ."

[16] *E.g., Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540, *passim* (1902) (contracts that are "collateral" to or "independent of" a prohibited contract or event may be enforced).

[17] "[W]hen a plaintiff cannot establish his cause of action without relying upon an illegal contract, he cannot recover." *Miller v. Ammon*, 145 U.S. 421, 426 (1892). *See also Small Co. v. Lamborne & Co.*, 267 U.S. 248, 252 (1925) (contracts "in themselves invalid" are not enforceable); *D. R. Wilder Mfg. Co. v. Corn Prod. Ref. Co.*, 236 U.S. 165, 172, 175-77 (1915).

"nondelivery agreement") violated the antitrust laws. The Court rejected this defense, stating:

> "[W]hile *the nondelivery agreement* between the parties *could not be enforced* by the court, if its unlawful character under the Sherman Act be assumed, it can hardly be said to enforce a violation of the Act to give legal effect to a completed sale of onions at a fair price." 358 U.S. at 521 (emphasis added).

Kelly thus applied the long-settled rule that a lawful contract provision—the sale agreement at issue in that case—may be enforced, so long as it is severable from the illegal portion of the contract.[18] But it left intact, and indeed reiterated, the corollary rule that a court will not enforce an illegal contract provision.

Kaiser Steel's allegation that the purchase-of-coal clause violates the federal antitrust and labor laws states a good defense under these principles. Kaiser

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[18] While the Court in *Kelly* recognized that words like "divisible" and "severable" often do not themselves provide a complete answer, it nevertheless made clear that a party will be able to invoke the enforcement powers of a court only if it can identify particular, lawful obligations that the court can enforce without acting in aid of illegal provisions. Thus, the Court said, where "a *lawful sale* for a fair consideration constitutes an *intelligible economic transaction in itself*," it may be enforced. 358 U.S. at 521 (emphasis added).

The Court of Appeals took this statement to mean that the illegality defense "does not lie against a contract that is 'an intelligible economic transaction in itself' " and held that, because the purchase-of-coal clause is "intelligible," its unlawfulness is no bar to its enforcement. 642 F.2d at 1310; Pet. App. 13a. But *Kelly* does not mean that an illegal contract may be enforced so long as it is "intelligible" to the enforcement court or that the illegality defense applies only to contracts that are not intelligible. Rather, *Kelly*, means that a court should look to the substance of the parties' agreement to see if the *lawful* portion is "an intelligible economic transaction in itself"—*i.e.*, separable from the illegal portion. If the lawful agreement is severable, it may be enforced. *See, e.g., Montague & Co. v. Lowry*, 193 U.S. 38, 45-46 (1904). But illegal agreements—like the nondelivery agreement in *Kelly* and the purchase-of-coal clause here—may not be enforced.

Steel did not attempt to escape any of its lawful contractual obligations under the 1974 agreement (such as the obligation to make contributions to the funds on coal produced by Kaiser Steel's own employees).[19] Rather, it resisted only complying with the purchase-of-coal clause that it alleges is itself forbidden by federal law.

By penalizing Kaiser Steel's purchases of coal from non-UMW producers, the purchase-of-coal clause has two separate illegal features: First, it constitutes an unlawful use of the UMW's bargaining power against Kaiser Steel in an effort to serve UMW objectives vis-a-vis employers like Mid-Continent who are not a part of Kaiser Steel's bargaining unit and thereby violates Section 8(e) of the LMRA. Second, it places non-UMW producers at a disadvantage in competing for sales to UMW signatories and, thus, is tantamount to a boycott of non-UMW producers in violation of the antitrust laws. On either theory, it is the purchase-of-coal clause itself, and not some collateral or separable agreement, that is illegal. Enforcement of that clause would enforce "the precise conduct made unlawful" by federal law[20] and would be an unprecedented departure from the heretofore uniform

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[19] The defendant tried to do just that in *Lewis v. Seanor Coal Co.*, 382 F.2d 437 (3d Cir. 1967), *cert. denied*, 390 U.S. 947 (1968). In that case, the trustees of the UMW funds sued an employer for contributions owed under the 1964 agreement on coal *produced* by its UMW employees. The employer defended on the ground that the separate *purchase*-of-coal clause violated Section 8(e). The court held that the illegality of the purchase-of-coal clause did not preclude enforcement of the separate provisions governing produced coal because Section 8(e) "merely makes a contract with such [an illegal hot cargo] provision unenforceable and void *to the extent* that it contains the 'hot cargo' provision." *Id.* at 440 (emphasis added; footnote omitted); *see* 29 U.S.C. § 158(e).

Huge v. Long's Hauling Co., 590 F.2d 457 (3d Cir. 1978), *cert. denied*, 442 U.S. 918 (1979), is to the same effect. There, too, the employer resisted a *lawful* obligation to make pension fund contributions on the ground that a separable provision of the collective bargaining agreement and certain union activities outside the contract were illegal.

[20] *Kelly v. Kosuga*, *supra*, 358 U.S. at 520.

rule that courts do not lend their aid to the enforcement of illegal contract clauses.

A. Enforcement of the Purchase-of-Coal Clause Would Bring About the Precise Conduct Condemned by Federal Law.

The Court of Appeals recognized that a contract provision may not be enforced "where the judgment of the Court would itself be enforcing the precise conduct made unlawful" by federal law,[21] but it failed properly to apply that rule in this case. Contract provisions like the purchase-of-coal clause are among the very "restraints forbidden by federal law," and enforcement of that clause would require specific conduct, the payment of a penalty or surcharge, that both Section 8(e) and the Sherman Act forbid.

1. *Section 8(e)*

Requiring Kaiser Steel to pay a penalty for dealing with Mid-Continent would cause the very injury that Section 8(e) of the LMRA is principally intended to prevent. Section 8(e) makes unlawful—indeed, "unenforcible and void"—any provision in a collective bargaining agreement that prohibits or penalizes an employer for doing business with another person if a purpose or effect of the provision is to achieve union objectives outside the employer's work unit.[22] Such provisions are known as "hot cargo" agreements.

The purpose of the prohibition of hot cargo agreements is to prevent a union from using its bargaining power in one work unit to advance union objectives (such as organizing non-union employees) outside that work unit. *National Woodwork Manufacturers Association v. NLRB*, 386 U.S. 612, 622-26, 633-35 (1967). In pro-

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[21] 642 F.2d at 1309; Pet. App. 12a, *quoting Kelly v. Kosuga*, *supra*, 358 U.S. at 520.

[22] *See, e.g., National Woodwork Mfrs. Ass'n. v. NLRB*, 386 U.S. 612 (1967); *International Ass'n of Machinists v. NLRB*, 315 F.2d 33 (D.C. Cir. 1962); *Orange Belt District Council of Painters v. NLRB*, 328 F.2d 534 (D.C. Cir. 1964).

scribing such agreements, Congress intended in part to protect employers outside the work unit (like Mid-Continent) with whom a union has a dispute from being subjected to a boycott by other, "neutral" employers (like Kaiser Steel). But its principal purpose in enacting Section 8(e) was to protect *neutral employers* like Kaiser Steel from being caught in the middle of the union's dispute with other parties. As this Court emphasized in *National Woodwork*, shielding "neutral employers" from the burdens of hot cargo provisions is the "touchstone" and "central theme" of Section 8(e). *Id.* at 624-25, 627, 635, 645.

The Court of Appeals believed that enforcement of the purchase-of-coal clause would not cause unlawful conduct because it could no longer cause Kaiser Steel to boycott Mid-Continent during the term of the expired 1974 agreement. But compelling payments of the penalties called for by the 1974 agreement would penalize Kaiser Steel for having done business with Mid-Continent during the contract period.[23] By enforcing the unlawful purchase-of-coal clause, the Court of Appeals would thus cause the precise injury that Section 8(e) is primarily intended to prevent—harm to the neutral employer, Kaiser Steel. The decision undermines the principal objective of Section 8(e) and cannot be reconciled with the teachings of *National Woodwork*.

2. *Sherman Act*

Enforcement of the purchase-of-coal clause would also bring about injury that the antitrust laws are intended

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[23] Moreover, enforcing the purchase-of-coal clause would be likely to cause future boycotts of non-UMW coal producers like Mid-Continent and thus bring about the very injury with which the Court of Appeals was concerned. Both the 1978 and 1981 UMW agreements contain provisions that are in all pertinent respects identical to the purchase-of-coal clause; other agreements in the future would be likely also to include illegal hot cargo clauses, especially if the illegality defense were denied in this case. In making purchasing decisions in the future, employers subject to these penalty clauses would undoubtedly be induced by the decision in this case to boycott non-union suppliers.

to prevent. The clause violates the Sherman Act by imposing an unlawful surcharge or penalty on purchasers who, like Kaiser Steel, buy some of their coal requirements from non-UMW producers. The clause is unlawful both because it impairs the ability of non-UMW producers to compete with UMW producers for sales to purchasers such as Kaiser Steel and because it penalizes such purchasers when they choose their suppliers on the basis of competitive merit.[24]

Kaiser Steel has not yet suffered injury cognizable under the antitrust laws because it has refused to participate in the boycott and has not yet paid the penalty for its refusal. Ordering Kaiser Steel to make the penalty payments called for by the purchase-of-coal clause would, however, subject Kaiser Steel to an injury—payment of an unlawful penalty—that the antitrust laws are intended to prevent.[25] It would also give Kaiser Steel and others an incentive not to do business with non-UMW producers in the future. The court's decision enforcing the clause would thus cause the precise conduct made unlawful by the antitrust laws and deprive Kaiser

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[24] The penalty clause has these effects even though it does not flatly prohibit trade with non-UMW producers. Contractual provisions designed to prevent a purchaser from dealing with competing suppliers are commonly enforced by provisions that require the purchaser to pay a penalty whenever he does business with a competing supplier. *See* pp. 20-21, *infra*. Where such clauses violate the antitrust laws, the purchaser as well as competing suppliers may recover damages. *E.g., Northern v. McGraw-Edison Co.*, 542 F.2d 1336, 1344, 1347 (8th Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977); *Siegel v. Chicken Delight Inc.*, 448 F.2d 43, 52 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972).

[25] Because it is unlawful to require purchasers to make payments pursuant to such a clause, those who are required to make such payments may recover three times their amount as treble damages under the antitrust laws. *See, e.g., Response of Carolina, Inc. v. Leasco Response, Inc.*, 537 F.2d 1307 (5th Cir. 1976); *Carpa, Inc. v. Ward Foods, Inc.*, 536 F.2d 39 (5th Cir. 1976); *Newberry v. Washington Post Co.*, 438 F. Supp. 470 (D.D.C. 1977).

Steel and the public "of the protection which Congress has conferred." [26]

B. An Illegal Contract Clause Is Unenforceable Even If Enforcing the Clause Would Not Require Conduct That Is Itself Illegal.

Even if the Court of Appeals were correct in believing that neither Section 8(e) nor the anti-trust laws was intended to prevent the kind of injury Kaiser Steel would suffer if required to make payments pursuant to the purchase-of-coal clause, its decision would still be wrong. The rule that courts do not act in aid of illegal contracts is not limited to those instances in which the court's remedy would require conduct that is itself illegal or cause the particular kind of injury the laws were intended to prevent. To the contrary, courts refuse to enforce "any alleged rights directly springing from [an illegal] contract" [27] and will thus deny their aid to parties "seeking to realize the fruits of an agreement that appears to be tainted with illegality." [28]

If the Court of Appeals' view of the law were correct, a hired murderer, after performing his part of a contract to kill, could prevail in a suit for the contract price on the theory that compelling payment would not bring

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[26] *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 563 (1961).

[27] *McMullen v. Hoffman, supra*, 174 U.S. at 654.

[28] *Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U.S. 227, 262 (1909). In reaching the opposite conclusion, the Court of Appeals relied on the language in *Kelly* that distinguished that case from one "where the judgment of the Court would itself be enforcing the precise conduct made unlawful by the [Sherman] Act . . . ." 358 U.S. at 520, *quoted at* 642 F.2d at 1309; Pet. App. 12a. The Court of Appeals read that language as if the phrase "enforcing the precise conduct" meant "requiring illegal remedial steps." But *Kelly* was concerned with the circumstances under which *lawful* agreements—like the sale agreement there at issue—could be enforced. *See* n.39, *infra*. The Court's language and the context in which it was used make it more plausible to construe the quoted phrase to mean "enforcing the particular illegal contractual promise."

about a homicide and thus would not cause the very conduct forbidden by law. That is not the law.

1. *Prior to This Case, Courts Had Uniformly Refused To Enforce Illegal Contract Clauses, Regardless of the Lawfulness of the Remedy Itself.*

As far as we have been able to determine, until this case no court had ever enforced an illegal contract clause. Regardless whether their orders would bring about conduct that is itself illegal, courts have uniformly refused to lend their aid to illegal agreements, either by distributing "'the profits realized'" therefrom or by awarding "'damages or compensation for the breach'" thereof. *McMullen v. Hoffman, supra*, 174 U.S. at 663.[29]

In *McMullen v. Hoffman*, for example, the Court denied the plaintiff's suit for an accounting of profits derived from an illegal bid-fixing scheme, even though the illegal scheme had already ended and the accounting would not have brought about any of the effects that the law barring bid-fixing was designed to prevent. As the Court stated: "In the case before us the cause of action grows directly out of the illegal contract, and if the court distributes the profits it enforces the contract which is illegal."[30]

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[29] The Court of Appeals evidently thought that this case was somehow different from all the rest because the purchase-of-coal clause in the 1974 agreement had not yet been held to be illegal and the issue was therefore whether "the district court properly declined to entertain the defense" of illegality. 642 F.2d at 1308 n.6; Pet. App. 9a n.6. But in almost all of the cases in which enforcement of a contract clause was refused on grounds of illegality, the contract provision had not previously been found to be unlawful. *See, e.g., Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U.S. 227 (1909); *McMullen v. Hoffman, supra; Eiberger v. Sony Corp.*, 459 F. Supp. 1276 (S.D.N.Y. 1978), *aff'd*, 622 F.2d 1068 (2d Cir. 1980); *Premier Elec. Constr. Co. v. Miller-Davis Co.*, 291 F. Supp. 295 (N.D. Ill. 1968), *aff'd*, 422 F.2d 1132 (7th Cir.), *cert. denied*, 400 U.S. 828 (1970); *Revlon, Inc. v. Williams Int'l, Inc.*, 30 Misc. 2d 772, 214 N.Y.S.2d 456 (Sup. Ct. 1961).

[30] 174 U.S. at 660.

Similarly, in *Farbenfabriken Bayer, A.G. v. Sterling Drug, Inc.*, 307 F.2d 207, 210 (3d Cir. 1962), *cert. denied*, 372 U.S. 929 (1963), the court refused to give effect to an illegal market allocation agreement between the parties by awarding the plaintiff "its share of the spoils," rejecting the plaintiff's argument that an accounting of profits should be granted because it would not effectuate any illegal allocation of markets. *See also United States v. Bayer Co.*, 135 F. Supp. 65, 72-73 (S.D.N.Y. 1955).

In other cases, courts have repeatedly refused to enforce contract provisions—like the purchase-of-coal clause at issue here—that called for payments to be made on account of certain commercial conduct, even though the conduct had already been completed and the contract had already expired. *Eiberger v. Sony Corp.*, 459 F. Supp. 1276 (S.D.N.Y. 1978), *aff'd*, 622 F.2d 1068 (2d Cir. 1980), for example, was an antitrust action in which Sony sought by way of a counterclaim sums owed for merchandise purchased by the plaintiff distributor under his franchise agreement, as well as accrued "warranty fees" that were to be paid for sales made by the distributor outside his assigned territory. The court recognized that the warranty fees were "an economic penalty" imposed for extraterritorial dealing; while it upheld Sony's claim on the lawful part of the contract for sums owed for purchased merchandise, it said that the "illegal levy or charge" in the form of the warranty fees "cannot be recovered." [31] It reached that result even though the distributorship had terminated and enforcement of the fee provision would not have restricted the distributor to his territory. *Revlon, Inc. v. Williams International, Inc.*, 30 Misc.2d 772, 214 N.Y.S.2d 456 (Sup. Ct. 1961),[32] and

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[31] 459 F. Supp. 1283, 1289.

[32] In *Revlon*, a manufacturer sued to enforce a provision in a contract with its distributor that entitled the manufacturer to "liquidated damages" for any sales the distributor made outside specified foreign countries. The distributor defended on the ground that the liquidated damages provision was a penalty clause that violated the

Kogod v. Stanley Co. of America, 186 F.2d 763 (D.C. Cir. 1950),[33] are to the same effect.[34]

In none of these cases would enforcement of the illegal clause have brought about conduct that was itself specifically prohibited by law, yet in each case the court refused to enforce the clause. These cases were correctly decided, and their lesson is clear: Courts will not enforce illegal contract clauses by requiring payment of

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antitrust laws. The manufacturer moved to strike the defense, but the court denied the motion. It held that the defense was valid under *Kelly v. Kosuga* because, in asserting the illegality of the penalty clause, the defendant distributor was attempting, not to avoid paying for goods received, but to prevent the manufacturer from reaping the fruits of the "plan of distribution which the defendant says is illegal." 214 N.Y.S.2d at 460.

[33] In *Kogod*, a three-party contract provided that if Stanley and K-B did not designate within two years a site on which Kass would build a theatre, Stanley and K-B would pay Kass $100,000 as damages. Stanley and K-B did not reach agreement, and Kass sought to enforce the damage provision. The court refused to enforce the provision on the ground that the contract was an agreement to build a new theatre located so as not to compete with any of Stanley's or K-B's theatres, in violation of the antitrust laws. Under such circumstances, the court said, "Kass [could not] be heard to complain of the failure of Stanley and K-B to carry out an agreement to suppress competition and extend monopoly in violation of the Sherman Anti-Trust Act," even though enforcing the damage provision would not itself have injured competition between Stanley and K-B. 186 F.2d at 765.

[34] *See also Carpa, Inc. v. Ward Foods, Inc.*, 536 F.2d 39, 55 n.6 (5th Cir. 1976) (court would not enforce a "20% penalty provision for buying outside," because the plaintiff "would be enlisting the Court's aid in directly breaching the antitrust laws."); *Premier Elec. Constr. Co. v. Miller-Davis Co.*, 291 F. Supp. 295 (N.D. Ill. 1968), *aff'd*, 422 F.2d 1132 (7th Cir.), *cert. denied*, 400 U.S. 828 (1970) (refusing damages for breach of a subcontracting agreement conditioned on an illegal bid-fixing scheme).

In *Vendo Co. v. Lektro-Vend Corp.*, four Justices of this Court concluded that enforcement of contract clauses in such cases " 'would be to make the courts a party to carrying out one of the very restraints forbidden by the Sherman Act.' " 433 U.S. 623, 646 n.3 (1977) (Stevens, J., dissenting). The majority of the Court had no occasion to pass on this question.

penalties, profits or damages for past conduct. The Court of Appeals erred because it disregarded this heretofore uniform principle.[35]

If the law were as the Court of Appeals held, sellers with great bargaining power would be able routinely to impose illegal penalties on their customers' purchases from competing suppliers and thereby to induce some customers not to do business with the competitors and to collect illegal penalties from those customers who chose to do so. It is precisely in order to guard against such consequences that courts do not enforce such illegal contract provisions. As the Supreme Court put it in *McMullen v. Hoffman*, the illegality defense

> "is only allowed for public considerations and in order the better to secure the public against dishonest transactions. To refuse to grant either party to an illegal contract judicial aid for the enforcement of his alleged rights under it tends strongly toward reducing the number of such transactions to a minimum. The more plainly parties understand that when they enter into contracts of this nature they place themselves outside the protection of the law, so far as that protection consists in aiding them to enforce such contracts, the less inclined will they be to enter into them." 174 U.S. at 669-70.[36]

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[35] The only case, other than this case, of which we are aware in which a court has ordered enforcement of a contract clause alleged to be illegal is *Mullins v. Reitz Coal Co.*, C.A. No. 78-0715 (D.D.C.). That case was decided by the United States District Court for the District of Columbia after the district court's decision in this case; Respondents here are also plaintiffs in that case, and they made the same arguments there. We believe the decision in *Reitz* is incorrect. The proceedings in that case have been stayed pending resolution of this case. *See also* n.73, *infra*.

[36] *See also Barrows v. Jackson*, 346 U.S. 249, 254 (1953) (when a court enforces an illegal agreement by awarding damages for its breach, "[t]he result of that sanction by the State would be to encourage the use of [such illegal] covenants"); *Weil v. Neary*, 278 U.S. 160, 173-74 (1929) ("What is struck at in the refusal to enforce [illegal] contracts" is "not only actual evil results but their

2. *No Special Circumstances Warrant Exempting This Case from the Rule That Courts Do Not Enforce Illegal Contract Provisions.*

The Court of Appeals virtually ignored the public interests sought to be served by the rule that courts do not enforce illegal contract clauses. Focusing instead on what it perceived as the proper accommodation of the private interests of the litigants, it concluded that the purchase-of-coal clause should be enforced even if it is illegal. The court set forth, in effect, three bases for its conclusion: first, the availability to Kaiser Steel of other remedies for the violations of federal law; second, its view of the parties' relative fault; and third, other considerations of equity. None of these reasons finds any support in the case law, and none of them would make sound policy.

a. *Availability of Other Remedies*

The Court of Appeals adverted repeatedly to the "other remedies" available to Kaiser Steel for the illegal purchase-of-coal clause.[37] Indeed, it decided the case as if the question were whether it should "add the remedy of contract avoidance to the other forms of relief" provided by the antitrust and labor laws.[38] But that is not the question. This case has nothing to do with Kaiser Steel's entitlement to a remedy for a violation of the antitrust and labor laws. The Court of Appeals' analysis is fundamentally flawed because it failed to take into account the distinction between remedies and defenses.

Kaiser Steel did not initiate this lawsuit or invoke the court's jurisdiction. Kaiser Steel did not seek any "remedy" to redress violations of federal law. It was Respondents who initiated these proceedings, and sought

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tendency to evil in other cases . . . . Enforcement of such contracts when actual evil does not follow would destroy the safeguards of the law and lessen the prevention of abuses.").

[37] 642 F.2d at 1318; Pet. App. 30a; *see also* 642 F.2d at 1312, 1313, 1314, 1315, 1318-20; Pet. App. 18a, 21a, 22a, 23a, 30a-33a.

[38] 642 F.2d at 1314; Pet. App. 22a.

from the court affirmative relief in the nature of specific performance. Kaiser Steel sought only to defeat the establishment by Respondents of a claim for relief based on a contract provision that violates federal law.

This case is thus virtually identical to *Bement v. National Harrow Co.*, 186 U.S. 70 (1902). There, the plaintiff sought to enforce two contracts that the defendant alleged violated the antitrust laws. Plaintiff argued that defendant was restricted to the injunctive and damage remedies provided by statute and thus could not raise the illegality defense. The Supreme Court rejected plaintiff's argument on the ground that, even

> "[a]ssuming that the plaintiff is right so far as regards any suit brought under [the antitrust] act, we are nevertheless of the opinion that any one sued upon a contract may set up as a defence that it is a violation of the act of Congress, and if found to be so, that fact will constitute a good defence to the action." *Id.* at 88.

The statutory "right to sue," the Court repeated, "does not prevent a private individual when sued upon a contract which is void as in violation of the act from setting it up as a defence . . . ." *Id.*

No case is to the contrary.[39] Indeed, if the law were otherwise—if the availability of affirmative remedies could

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[39] The Court of Appeals' reluctance to provide Kaiser Steel with "another means of redress" (642 F.2d at 1319; Pet. App. 31a) for the violations of federal law inherent in the purchase-of-coal clause stemmed in part from its misunderstanding of *Kelly v. Kosuga*, *supra*. *Kelly* did not involve the *defense* of illegality of the sale contract that the plaintiff there had sued to enforce; the legality of that contract was not assailed. Rather, the issue in *Kelly* was, in effect, whether the court should have supplemented the statutory treble damage and injunction remedies available to the defendant for the illegality of the separate "nondelivery agreement" with the additional *remedy* of nonenforcement of the lawful sale contract. *See D. R. Wilder Mfg. Co. v. Corn Prod. Ref. Co.*, 236 U.S. 165, 177 (1915) (a collateral antitrust violation may not be "indirectly attacked" by way of a defense to a contract action to which it is not relevant).

render the illegality defense unavailable—then there could almost never be an illegality defense. In that event, courts would routinely be called upon to participate in schemes that violate federal law and to enforce a whole range of illegal contracts. Certainly Congress did not intend to achieve that result by creating affirmative remedies for violations of federal law.[40]

b. *Relative Fault*

The Court of Appeals based its decision in part on its assessment of the "relative fault" of the parties.[41] It concluded that Kaiser Steel should be barred from raising the illegality defense because it had previously "ignored" the purchase-of-coal clause without pursuing "its opportunities for a timely and direct adjudication of its rights."[42] Since Kaiser Steel did not challenge the purchase-of-coal clause during the term of the agreement, the Court said, it in effect had waived its right and should now be estopped to object to the purchase-of-coal clause on account of its unlawfulness.

Just as reliance on the availability of other remedies would, in essence, eliminate the defense of illegality, so too would reliance on notions of waiver amount to writing the defense of illegality out of the law. By definition, a party can raise a *defense* of illegality only after having waited until suit is brought against it. Yet, before this case, no court of which we are aware had ever held that a defendant could be deemed to have

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[40] *See* Lockhart, *Violation of the Antitrust Laws as a Defense in Civil Actions*, 31 Minn. L. Rev. 507, 514 (1947) (nothing in the Sherman Act indicates "any intention to take away that sanction [nonenforcement] which had been the very tool by which the common law policy against restraint of trade had been developed."). *See also Apex Hosiery Co. v. Leader*, 310 U.S. 469, 497-98 (1940).

[41] *See* 642 F.2d at 1311; Pet. App. 15a.

[42] 642 F.2d at 1312; Pet. App. 18a. Kaiser Steel's "strategy," said the court below, "betokens such unclean hands that it weighs against permitting Kaiser to raise the illegality defense." *Id.* (footnote omitted).

waived its right to resist compliance with an unlawful contract clause.[43]

To the contrary, in case after case, courts have refused to enforce contract clauses that were alleged to be illegal, even though the defendant had made no effort to challenge the clause earlier, the plaintiff had performed all of his obligations and the contract had expired by its terms.[44] As this Court has said, notions of waiver or estoppel have no place in an action to enforce a contract that violates the law[45] and "will not be permitted to thwart the purposes of statutes of the United States" that make certain kinds of contracts illegal.[46]

Applying waiver principles to preclude a court from examining the illegality of the purchase-of-coal clause in cases such as this not only would be bad law, but also would inequitably and unwisely allocate responsibility between the parties. Respondents long knew that Kaiser Steel was regularly purchasing coal from non-

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[43] The authorities upon which the Court of Appeals relied for the proposition that " 'the relative guilt of the parties' " is relevant "in deciding whether to enforce an illegal contract" (642 F.2d at 1311; Pet. App. 15a) are not to the contrary. Most of those authorities have nothing to do with enforcement of illegal contract provisions, and the few that are relevant suggest only that courts may in certain circumstances enforce lawful promises made for unlawful consideration. 642 F.2d at 1311; Pet. App. 15a-16a.

[44] *E.g., McMullen v. Hoffman, supra; Farbenfabriken Bayer, A.G. v. Sterling Drug, Inc., supra; Kogod v. Stanley Co. of America, supra; Eiberger v. Sony Corp., supra; United States v. Bayer Co., supra; Revlon, Inc. v. Williams Int'l, Inc., supra; see also Carpa, Inc. v. Ward Foods, Inc.*, 536 F.2d 39 (5th Cir. 1976).

[45] *See Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U.S. 227, 263 (1909).

[46] *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173, 176 (1942). *See also, e.g., Nathan v. Tenna Corp.*, 560 F.2d 761 (7th Cir. 1977); *Inter-Continental Promotions, Inc. v. Miami Beach First Nat'l Bank*, 441 F.2d 1356 (5th Cir.), *cert. denied*, 404 U.S. 850 (1971); *Kaiser-Frazer Corp. v. Otis & Co.*, 195 F.2d 838, 843-44 (2d Cir.), *cert. denied*, 344 U.S. 856 (1952); *Doherty v. Bartlett*, 81 F.2d 920 (1st Cir.), *cert. denied*, 298 U.S. 676 (1936).

UMW producers without complying with the purchase-of-coal clause. Both Respondents and Kaiser Steel long doubted the legality of the purchase-of-coal clause. And both Respondents and Kaiser Steel could have brought suit sooner, but both chose not to. If anyone should be charged with the risk of inaction, it is Respondents. Only they knew whether they intended to abandon their longstanding policy of nonenforcement and thus make litigation regarding the lawfulness of the clause necessary.[47]

If left to stand, the Court of Appeals' decision would lead to a proliferation of what may be wholly unnecessary lawsuits. Had Kaiser Steel known that it would be unable to defend against an action to enforce the penalty clause by challenging the lawfulness of the clause, it could not prudently have refrained from initiating litigation, even in the face of Respondents' longstanding policy of not enforcing the purchase-of-coal clause. If the decision is left to stand, similarly situated parties in the future would have to bring suit promptly, even where enforcement is unanticipated or unlikely. In that event, litigation would abound, and the prospect of peaceful resolution of disputes regarding allegedly unlawful contract clauses would be lost.

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[47] In concluding that Kaiser Steel's challenge to the purchase-of-coal clause was untimely, the Court of Appeals pointed to a provision in the 1974 agreement that required employers to enter negotiations concerning a possible substitute for the purchase-of-coal clause in the event that a final, unappealable judicial decision rendered that clause unenforceable. 642 F.2d at 1312-13; Pet. App. 17a-19a. The court evidently believed that that provision gave Kaiser Steel an incentive to wait until after the expiration of the contract to litigate the lawfulness of the purchase-of-coal clause. But Kaiser Steel "waited" to litigate the legality of the purchase-of-coal clause only until enforcement of the clause was first sought. The court's reliance on the renegotiation provision to justify its enforcing the illegal purchase-of-coal clause cannot be squared with the uniform rule that waiver and related doctrines do not apply to the illegality defense, with the public policies served by the illegality defense, or with the fact that Respondents were in a better position than Kaiser Steel to know whether and when to commence litigation and thus should bear the burden of inaction.

c. *Other Considerations of Equity*

Under the general rubric of "considerations of equity," the Court of Appeals in various ways expressed its concern that nonenforcement of the purchase-of-coal clause would unjustly enrich Kaiser Steel.[48] That is not the case, and, in any event, a contract that contravenes public policy is unenforceable regardless how the court balances "the equities as between the parties . . . ."[49]

Recognition of the illegality defense always relieves the defendant of an obligation he undertook and denies the plaintiff a benefit for which he bargained. Yet no court before now has seen fit to enforce an illegal agreement on the ground of unjust enrichment. To the contrary, courts have uniformly held that they will leave the parties where they find them instead of aiding them to enforce agreements that violate public laws.[50] Courts have accordingly refused to enforce contract clauses that were alleged to be illegal where the plaintiff was suing for money owed for services previously rendered or goods previously supplied,[51] where the defendant had benefited from the contract as a whole and had received all the consideration due him,[52] where the plaintiff had per-

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[48] 642 F.2d at 1311-13; Pet. App. 15a-19a.

[49] *Kaiser-Frazer Corp. v. Otis & Co.*, 195 F.2d 838, 844 (2d Cir.), *cert. denied*, 344 U.S. 856 (1952).

[50] *See Embrey v. Jemison*, 131 U.S. 336, 348-49 (1889) (payments called for by an illegal contract are " 'tainted with [the] illegality [of that contract]' " and " 'do [not] represent anything of value in the hands of the defendant which, in good conscience, belongs to the plaintiff' "). *Cf. Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139 (1968).

[51] *See, e.g.*, cases cited at n.44, *supra*.

[52] *See, e.g.*, cases cited at n.44, *supra*, and *Associated Press v. Taft-Ingalls Corp.*, 340 F.2d 753 (6th Cir.), *cert. denied*, 382 U.S. 820 (1965). In all these cases, the illegal contract clause was a part of the overall consideration promised by the defendant. Still, the courts refused to enforce the illegal clauses, leaving the plaintiffs to be satisfied solely by their lawful consideration.

By the same token, the fact that the penalty clause in this case might be said to be a part of the total consideration paid by Kaiser

formed all of his obligations,[53] and even where the defendant benefited from the illegal clause itself.[54]

Respondents are not immune from these rules simply because they are pension fund trustees.[55] Employers should of course be required to comply with lawful obligations to make payments to pension funds. But there is nothing in the law that suggests that such funds are exempt from the rule that courts do not enforce illegal contract clauses.[56]

Steel provides no basis for enforcing it. In the first place, the consideration sought by the union in this case was a boycott of non-UMW coal producers. Even the Court of Appeals agrees that a court could not enforce payment of that consideration. *See* n.66, *infra*. Moreover, Kaiser Steel has paid all other consideration under the 1974 agreement—wages and benefits for labor actually performed in producing coal, including $9 million in contributions to the health and pension funds from 1974 to 1977 alone. It has refused to pay only the illegal penalty, which bears no relation to the amount or value of any labor performed by Kaiser Steel's employees. (This case is thus a far cry from *Kelly v. Kosuga*, in which the defendant had received plaintiff's onions and then refused to pay the consideration for them for reasons unrelated to the lawfulness of the sale agreement sought to be enforced. It was in that context that the Court in *Kelly* expressed concern about " 'preventing people from getting other people's property for nothing when they purport to be buying it.' " 358 U.S. at 520-21.)

[53] *See* cases cited at n.44, *supra*.

[54] *E.g., McMullen v. Hoffman, supra; Farbenfabriken Bayer, A.G. v. Sterling Drug, Inc., supra; United States v. Bayer Co., supra.*

[55] While the Court of Appeals recognized that, "[a]s a rule, third-party beneficiaries, like the Trustees here, are subject to the contract defenses of nonperforming promisors," it nevertheless held that Respondents enjoy a "special status" that entitles them to an "exemption" from those defenses in this case. 642 F.2d at 1312; Pet. App. 17a.

[56] *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960), cited by the Court of Appeals, is not to the contrary. The Supreme Court there held that an employer's right to set off money owed to it by a union on account of an illegal strike against contributions owed by it to a pension fund pursuant to a lawful contract provision depended on whether the contract made performance by the union a condition precedent to the employer's duty to make the contributions. *Id.*

Creating such an exemption would provide an incentive for the inclusion of illegal clauses in future contracts[57] and would thus be unwise as a matter of policy, as well as wrong as a matter of law.[58] If pension fund trustees

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at 465. The Court's opinion did not involve an unlawful contract clause, nor did it suggest that trustees may enforce such clauses. *Cf. Lewis v. Mears*, 297 F.2d 101, 104 (3d Cir.), *cert. denied*, 369 U.S. 873 (1962); *Lewis v. Lowry*, 295 F.2d 197, 199 (4th Cir. 1961), *cert. denied*, 368 U.S. 977 (1962).

The Court of Appeals also cited *Viacom Int'l, Inc. v. Tandem Productions, Inc.*, 526 F.2d 593 (2d Cir. 1975), in which an assignee was permitted to enforce an exclusive distributorship agreement that the defendant alleged was part of a broader, illegal tying arrangement involving production, syndication and distribution rights. The court rejected the illegality defense because the assignee had acquired and sought to enforce only the distributorship agreement and that agreement standing by itself was not illegal. The court reasoned that whether a contract could be enforced would "depend on the court's perception of the contract as a separate or 'collateral' entity or as an integral part" of the illegal agreement. 526 F.2d at 598.

[57] Judge Weinfeld saw this danger in *United States v. Bayer Co.*, *supra*. In that case, an assignee of a party to an agreement that violated the antitrust laws, but had long since expired, sued another party to the agreement for the assignor's share of the profits from the conspiracy. The assignee argued that it was not a party to the unlawful scheme and that, if it could not recover the monies owed, the co-conspirator would get a windfall. Judge Weinfeld rejected that argument, holding instead that courts do not aid anyone seeking to enforce or realize the fruits of an unlawful agreement. He reasoned that upholding the assignee's argument

> "would at once recognize an effective means to frustrate the intent of the anti-trust laws. Under this concept all a . . . party to an illegal agreement need do is to . . . effect an assignment of the proceeds of the agreement . . . and have its assignee enjoy the fruits of the illegal contract free of governmental sanction. The public policy underlying the anti-trust laws is not to be frustrated so easily." 135 F. Supp. at 72.

[58] Rules of law that apply unequally to different classes of litigants are inherently suspect. There is no apparent reason why pension fund trustees should be preferred in contract enforcement actions over defendants such as trustees of eleemosynary institu-

could enforce illegal contracts that require payments to them, parties would be able to circumvent the antitrust and labor laws simply by casting illegal restraints in the form of clauses that require penalty payments to such funds.[39]

II. FEDERAL COURTS HAVE JURISDICTION TO DECIDE WHETHER CONTRACT PROVISIONS THEY ARE ASKED TO ENFORCE VIOLATE SECTION 8(e) OF THE LMRA.

Section 8(e) of the LMRA prohibits certain types of contract clauses and provides that all such clauses are "unenforcible and void." 29 U.S.C. § 158(e). Notwithstanding this clear statutory command, the Court of Appeals held that the district court did not have jurisdiction to determine whether the purchase-of-coal clause violated Section 8(e), even in an action brought for specific performance of that clause. Only the NLRB, said the court, can decide in the first instance whether a contract clause violates Section 8(e).

The Court of Appeals' decision rests on its fundamental misunderstanding of the distinction between remedies and defenses. Moreover, its construction of the LMRA cannot be reconciled with the statute or the prior

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tions (*see, e.g.*, Brief *Amicus Curiae* of the Trustees of Boston University in Support of Petition for Writ of Certiorari, April 23, 1981). Indeed, pension fund trustees could themselves wind up as defendants in actions similar to this; in that event, would the court enforce the contract and thus deprive the defendant fund of money, or would it fashion a new rule that only pension funds can interpose illegality defenses in contract enforcement actions brought by pension funds? *Cf. Federated Department Stores, Inc. v. Moitie*, No. 79-1517, slip op. at 7 (S.Ct. June 15, 1981).

[39] That is precisely what happened in this case: The union and Respondents abandoned prior lawful clauses (C.A.J.A. 477-78, 570); disregarded other, more straightforward means of funding the funds (C.A.J.A. 27-28); and, in order to serve other ends, insisted upon the purchase-of-coal penalty clause, which they knew to be of dubious legality (C.A.J.A. 28; *see* p. 5, *supra*).

decisions of this Court and raises a serious constitutional question.

A. A Court Always Has the Power To Decide Whether a Contract Clause It Is Asked To Enforce Violates the Law.

The Court of Appeals thought that the issue in this case was whether it should "add the remedy of contract avoidance to the other forms of relief which the statute expressly provides" [60] and held that it did not have jurisdiction to create such an additional remedy. But that is not the issue. This case concerns defenses, not remedies, and the difference is crucial.

It has long been clear that a party may raise as a defense matters that it may not assert as an affirmative claim for relief. Indeed, it has repeatedly been held that a court that is without jurisdiction to decide an issue raised directly by a plaintiff may nevertheless decide the same issue when it is raised as a defense in a suit over which the court does have jurisdiction.[61] Thus, as this Court has recognized, a court may decide the merits of a defendant's claim that a contract the court is called upon to enforce violates federal law even if that question would normally lie within the exclusive jurisdiction of

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[60] 642 F.2d at 1314; Pet. App. 22a.

[61] *E.g., De Magno v. United States*, 636 F.2d 714 (D.C. Cir. 1980). For example, a defendant may raise defensively, to defeat a plaintiff's action, a claim that would be barred by the statute of limitations if asserted affirmatively (*see, e.g., Bull v. United States*, 295 U.S. 247 (1935)); a claim that would not satisfy the requisite jurisdictional amount if asserted affirmatively (*see, e.g., Lenz v. Wagner*, 240 F.2d 666 (5th Cir. 1957)); a claim against the government that would be barred by sovereign immunity if asserted affirmatively (*see, e.g., United States v. Pusey*, 47 F.2d 22 (9th Cir. 1931); *Burgess v. M/V Tamano*, 382 F. Supp. 351 (D. Me. 1974), *aff'd*, 559 F.2d 1200 (1st Cir. 1977)); and a claim that would normally lie within the exclusive jurisdiction of another forum if asserted offensively in an independent action for relief (*see, e.g., Hampton House Management Corp. v. Saleh*, 357 F. Supp. 591 (S.D.N.Y. 1973); *cf. United States v. Grand Trunk Western R. Co.*, 50 Ad. L.2d (P&F) 267 (W.D. Mich. Jan. 28, 1981)).

another forum. *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 635-36 n.6 (1977).[62]

In this case, it is Respondents who are seeking affirmative relief. They brought the action. They chose the forum. They chose the time to sue. And they asked the court for assistance in the nature of specific performance. The issue in this case is thus whether Respondents are entitled to the remedy they seek. Had the Court of Appeals kept this in mind, it would have understood that it could not grant Respondents specific enforcement of the purchase-of-coal clause without first deciding whether the clause violated Section 8(e)—whether, in other words, it created any valid, legal obligations.

Kaiser Steel, on the other hand, is not a claimant seeking a remedy for a violation of federal law. It did not initiate this lawsuit or invoke the court's jurisdiction. It seeks only to demonstrate, by way of defense, that Respondents are not entitled to the remedy they seek. Whatever may be the exclusive jurisdiction of the NLRB to grant remedies to claimants—like Respondents here—who initiate litigation, it does not preclude a federal court from deciding whether a contract clause it is asked to enforce violates federal law.

A contract provision like the purchase-of-coal clause that violates federal law "creates no right of action which a court of justice will enforce." [63] A federal court

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[62] *Accord, Big Top Stores, Inc. v. Ardsley Toy Shoppe, Ltd.*, 64 Misc. 2d 894, 315 N.Y.S.2d 897 (Sup. Ct. 1970), *aff'd*, 36 A.2d 582, 318 N.Y.S.2d 924 (App. Div. 1971) (defense of illegality under the Sherman Act); *Shareholders Management Co. v. Gregory*, 449 F.2d 326 (9th Cir. 1971) (defense of illegality under the Securities Exchange Act of 1934).

[63] *Miller v. Ammon*, 145 U.S. 421, 427 (1892). *See also Boatland, Inc. v. Brunswick Corp.*, 558 F.2d 818, 823 (6th Cir. 1977) (an illegal contract clause is "nugatory and without legal effect"); *Cecil B. DeMille Productions v. Woolery*, 61 F.2d 45, 49 (9th Cir. 1932) (a contract provision that is prohibited by law has "no legal existence"); *Laborers' Int'l Union Local 107 v. Kunco, Inc.* 344 F. Supp. 626, 630 (W.D. Ark. 1972) ("no cause of action for alleged breach" of a contract clause that violates federal law "can be maintained"), *rev'd on other grounds*, 472 F.2d 456 (8th Cir. 1973).

thus can always decide whether a contract clause it is called upon to enforce violates federal law. The illegality defense must be resolved in order to determine whether the plaintiff who seeks to enforce the clause is entitled to the remedy it seeks. The court's task in such a case has nothing to do with creating a remedy for the defendant.

In *Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11 (1979), this Court recognized that entertaining a defense is not the same as creating a remedy. As the Court said, regardless whether a statute declaring certain types of contracts "void" creates a private cause of action for relief from such a contract, "[*a*]*t the very least*" the statute "could be raised *defensively* in private litigation *to preclude the enforcement of* . . . [the] contract." [64]

Indeed, where, as here, a party has asked the court to use its equitable powers to enforce a contract, the court has not only the power, but a duty first to determine whether that contract violates federal law and is thus unenforceable. As this Court put it in *Hurd v. Hodge*, 334 U.S. 24, 34-35 (1948):

> "The power of the federal courts to enforce the terms of private agreements is *at all times* exercised subject to the restrictions and limitations of the public policy of the United States as manifested in . . . federal statutes. . . . Where the enforce-

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[64] *Id.* at 18 (emphasis added). The two cases cited by the Court of Appeals (642 F.2d at 1314; Pet. App. 22a) for the proposition that contracts declared by statute to be "void" nevertheless may be enforced are not to the contrary. *Mills v. Auto-Lite Co.*, 396 U.S. 375 (1970), did not involve a question of contract enforcement, for the contract in that case had been fully executed by all parties. *Mills* raised the very different question whether a party to an agreement is entitled, after execution, to "retrospective relief" in the nature of rescission. *Id.* at 386. In *Occidental Life Ins. Co. v. Pat Ryan & Assoc.*, 496 F.2d 1255, 1266-67 (4th Cir.), *cert. denied*, 419 U.S. 1023 (1974), the court held only that the securities laws do not require the nonenforcement of a legal contract on account of the illegality of collateral matters.

ment of private agreements would be violative of that policy, *it is the obligation of courts to refrain from such exertions of judicial power.*" (Emphasis added; footnote omitted.)[65]

B. The LMRA Authorizes Federal Courts To Decide Whether Contract Clauses They Are Asked To Enforce Violate Section 8(e).

Congress did not intend, in enacting Section 8(e) of the LMRA, to create a special exception to the rule that courts do not enforce contracts that violate the law. To the contrary, it is clear from the plain language and legislative history of the statute, and from an analysis of the NLRB exclusive jurisdiction doctrine itself, that courts have jurisdiction to determine whether contract clauses they are asked to enforce violate Section 8(e). Any other construction of the LMRA would raise serious constitutional problems.

1. Hot Cargo Clauses May Not Be Enforced Because Section 8(e) Provides That All Such Clauses Are "Unenforcible and Void."

Section 8(e) provides that "it shall be an unfair labor practice" to enter into an agreement containing a hot cargo clause. 29 U.S.C. § 158(e). But in a separate, independent clause, Section 8(e) also states that "any contract or agreement entered into heretofore or hereafter containing such [a hot cargo clause] shall be to such extent unenforcible and void." *Id.* By its literal terms, Section 8(e) is thus an unqualified and unmistakable statutory command that hot cargo clauses are void at their inception and are at all times unenforceable by the federal courts.

The Court of Appeals recognized that it could not disregard the "unenforcible and void" clause in Section

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[65] *See also Nyhus v. Travel Management Corp.*, 466 F.2d 440, 447 (D.C. Cir. 1972) ("Invalidity of a contract offensive to public policy . . . is a barrier 'which the court itself [is] bound to raise in the interests . . . of justice' "); *Nathan v. Tenna Corp.*, 560 F.2d 761, 763 (7th Cir. 1977).

8(e), but it avoided a literal reading of the language and gave it instead a much narrower, and less straightforward, construction. According to the Court of Appeals, the "unenforcible and void" language means only that a union may not obtain specific performance of an agreement by an employer not to do business with a third-party supplier.[66]

The court made two errors. First, the court overlooked the primary purpose of Section 8(e), which, as noted, is to protect neutral employers like Kaiser Steel, not boycotted third parties.[67] It makes no sense to construe the most explicit and powerful part of Section 8(e) to protect only parties whose interests were not of primary concern to Congress.

Second, the Court of Appeals' interpretation of the statute finds no support in its language or legislative history. The language of the statute is unqualified, and the legislative history makes clear that Congress intended both to make the act of entering into a hot cargo clause an unfair labor practice and to make all such hot cargo clauses unenforceable.[68]

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[66] 642 F.2d at 1314; Pet. App. 22a. The court actually said that it construed the language to prevent unions "from obtaining specific performance of a 'hot cargo' clause . . . ." 642 F.2d at 1315; Pet. App. 23a. Since Respondents in this case sought, and obtained from the lower courts, specific performance of the hot cargo clause here at issue, the court's stated principle would compel a result different from that which it reached. Presumably, therefore, the court meant that the "unenforcible and void" language was intended to prohibit specific performance of actual refusals to deal, not all forms of specific performance of illegal hot cargo clauses.

[67] *See* pp. 15-16, *supra*.

[68] The original bill passed by the Senate made it an unfair labor practice for a union and a common carrier to enter into a hot cargo agreement and provided that all such hot cargo agreements are "unenforcible and void." National Labor Relations Board, 2 Legislative History of Labor-Management Reporting and Disclosure Act of 1959 ("Legis. Hist.") at 1258 (1959) (remarks of Senator Kennedy); *see also* remarks of Senator Goldwater (the bill "makes unenforcible and unlawful any 'hot cargo' agreement between a

Nothing in the history of the statute suggests that courts may enforce illegal hot cargo clauses or that only contract clauses that the NLRB has previously found to be illegal are unenforceable and void. Nor is there any indication that Congress intended the "unenforcible and void" language to have only the narrow meaning attributed to it by the Court of Appeals, that Congress intended employers to comply with or courts to enforce illegal hot cargo clauses under any circumstances, or that Congress intended to withhold from the federal courts the power to determine the legality of contract clauses they are called upon to enforce.[69]

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union and a common carrier"), *id.* at 1290. The later House version prohibited all hot cargo agreements, not just those in the common carrier industry, and provided that "[a]ll such agreements are void and unenforcible." *Id.* at 1361; *see also* remarks of Senator Goldwater, *id.* at 1437. Congressman Griffin, the sponsor of the House bill after whom the statute was named, described a provision in the House bill that became Section 8(e) as follows:

> "Subsection (b) of Section 705 *not only* makes it *an unfair labor practice* to enter into a 'hot cargo' agreement, *but also* makes it clear that such contracts are *void and unenforcible.*" *Id.* at 1523 (emphasis added).

See also remarks of Congressman Rhodes, *id.* at 1581 ("not only . . . an unfair labor practice . . . but also . . . void and unenforceable").

The language that became Section 8(e) as enacted was subsequently drafted in the Senate and was intended to embody the House position. *Id.* at 1383. Congressman Cramer described Section 8(e) as follows:

> "This section makes an unfair labor practice and declares unenforceable and void a collective agreement [that includes an illegal hot cargo clause.] * * * What the wording clearly does is to describe as an unfair labor practice a hot cargo contract between an employer and a labor organization and then pronounce it unenforcible and void." *Id.* at 1619-20.

See also 1 Legis. Hist. at 943 (Conference Report).

[69] On the Court of Appeals' theory, a party seeking to enforce a hot cargo clause, not only would be entitled to specific performance of the clause under some circumstances, but also would, under all circumstances, be entitled to damages for a party's past refusal to participate in an illegal boycott. The prospect of such damage

To the contrary, as Senator Goldwater, one of the bill's sponsors, explained after the enactment of Section 8(e), the statute renders hot cargo clauses "unenforcible and void for all purposes." He added:

> "This means that *such contractual clauses are per se illegal.* It is unlawful for *either party* even to execute such an agreement, . . . *to compel the other party to enter into it or live up to it even if his refusal to do so is in breach* of a voluntary agreement to abide by the agreement, and finally, *such breach does not constitute a good cause of action in a suit of law to recover damages* for the breach or to secure specific performance of the agreement." [70]

Prior decisions of this Court confirm that the illegality of a hot cargo clause can be raised defensively in private litigation to bar the enforcement of such a clause. In *National Woodwork Manufacturers Association v. NLRB*, *supra*, the Court explained that Section 8(e) was added to the LMRA to close a "loophole" in the law by eliminating "situation[s] in which [hot cargo] clauses might be employed to exert subtle pressures upon employers to engage in 'voluntary' boycotts" and preventing *"the possibility of damage actions against employers for breaches of 'hot cargo' clauses."* 386 U.S. at 634 (emphasis added). It is precisely this loophole of damage ac-

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actions would do much to encourage illegal hot cargo boycotts, and courts would be lending their aid to such boycotts by awarding damages no less than if they ordered specific performance of the refusal to deal itself. *See Danielson v. International Organization of Masters, Mates and Pilots*, 521 F.2d 747, 753-54 n.7 (2d Cir. 1975) (because "Section 8(e) prohibits hot cargo agreements whether 'express or implied,'" a "complete cessation of business with another person is not necessary to come within the prohibition"; where an agreement permits such business "only under extremely onerous conditions, [such as] the payment of damages, the agreement 'impliedly' prohibits the 'doing of business with another person.'"). *See also* pp. 20-21 & n.36, *supra*.

[70] 2 Legis. Hist. at 1857 (emphasis added); *id.* at 1829 ("You can't strike to compel an employer to live up to [a hot cargo clause] and you can't take it into a court and sue for breach of contract."). *See also* remarks of Representative Kearns, *id.* at 1861.

tions to enforce illegal hot cargo clauses that the Court of Appeals' opinion here would reopen.[71]

More recently, in *Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 628 (1975), this Court reiterated that Section 8(e) was designed "to plug technical loopholes" by proscribing "contractual agreements to achieve economic coercion prohibited by § 8(b)(4)." As Justice Stewart said, in a passage with which no Justice disagreed:

> "[T]he signatory of a purely voluntary agreement that violates § 8(e) is fully protected from any damage that might result from the illegal 'hot cargo' agreement by *his ability simply to ignore the contract provision that violates § 8(e)* . . . . Since § 8(e) provides that any prohibited agreement is 'unenforcible and void,' *any union effort to invoke legal processes to compel the neutral employer to comply with his purely voluntary agreement would obviously be unavailing.*" 421 U.S. at 649-50 n.9 (emphasis added) (dissenting opinion).[72]

While they are not unanimous, the lower courts also have recognized that illegal hot cargo clauses may not

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[71] *See also Danielson v. International Organization of Masters, Mates and Pilots*, 521 F.2d 747, 753 (2d Cir. 1975); *McLeod v. American Federation of Television and Radio Artists*, 234 F. Supp. 832, 841 (S.D.N.Y. 1964) (illegal hot cargo provision is "void and unenforceable as of the time of its insertion into the contract and, *ipso facto*, cannot be the basis of any breach of the collective bargaining agreement"), *aff'd per curiam*, 351 F.2d 310 (2d Cir. 1965).

[72] In *Connell*, the majority found "no legislative history in the 1959 Congress suggesting that labor-law remedies for § 8(e) violations were intended to be exclusive," and it concluded that an illegal hot cargo agreement therefore could give rise to liability under the Sherman Act. 421 U.S. at 634. The dissenting Justices, recognizing the distinction between remedies and defenses that eluded the Court of Appeals in this case, concluded both that Congress "restrict[ed] the remedies for violations of § 8(e) itself to those available from the Board" (*id.* at 650) and that employers could safely ignore illegal hot cargo clauses because such clauses could not be judicially enforced.

be enforced.[73] The Second Circuit, for example, has twice held that a federal court has jurisdiction to determine whether a contract violated Section 8(e) and was thus unenforceable, even though the party asserting its illegality had not taken its complaint to the NLRB.[74] The Third Circuit also has made clear that the illegality of the purchase-of-coal clause could be raised as a defense to a lawsuit to enforce that very clause.[75] And the Tenth Circuit recently remanded for further factual proceedings a district court decision that a provision in a collective bargaining agreement violated Section 8(e); the court did not question the power of the district court to decide the

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[73] One other circuit court agrees with the Court of Appeals in this case. In *Waggoner v. R. McGray, Inc.*, 607 F.2d 1229 (9th Cir. 1979), the Ninth Circuit ruled that the NLRB's primary jurisdiction precludes federal courts from acting as the initial arbiters of unfair labor practice charges in actions brought under Section 301.

[74] *United Optical Workers Local 708 v. Sterling Optical Co.*, 500 F.2d 220 (2d Cir. 1974); *Todd Shipyards Corp. v. Industrial Union of Marine and Shipbuilding Workers Local 39*, 344 F.2d 107 (2d Cir. 1965). *See also Carrier Air Conditioning Co. v. NLRB*, 547 F.2d 1178, 1191 n.15 (2d Cir. 1976), *cert. denied*, 431 U.S. 974 (1977) ("resort to the courts to enforce a provision invalid under § 8(e) will almost always be futile, given the section's declaration that such provisions are unenforcible [sic] and void."); *Botany Indus., Inc. v. Amalgamated Clothing Workers*, 375 F. Supp. 485 (S.D.N.Y.), *vacated as moot*, 506 F.2d 1246 (2d Cir. 1974) (court had jurisdiction to hear Section 8(e) defense to union's Section 301 suit to enforce an arbitrator's award directing employer to comply with alleged hot cargo clause).

[75] *Lewis v. Seanor Coal Co.*, 382 F.2d 437 (3d Cir. 1967), *cert. denied*, 390 U.S. 947 (1968). *See also Pittsburgh Die Sinkers Lodge No. 50 v. Pittsburgh Forgings Co.*, 255 F. Supp. 142, 146 (W.D. Pa. 1966) (an action does not lie to enforce a hot cargo provision because Section 8(e) of the LMRA "makes such restrictive agreements void"). In *Huge v. Long's Hauling Co.*, 590 F.2d 457 (3d Cir. 1978), *cert. denied*, 442 U.S. 918 (1979), the Third Circuit stated that a federal court may not initially decide an issue of labor law illegality. But, as noted (*supra* at n.19), it was not argued in *Huge* that the contract provision there sought to be enforced was itself unlawful; the employer in that case was in effect seeking a labor law remedy for the alleged illegality of a wholly separate contract provision and events outside the contract.

Section 8(e) issue, even though the employer challenging the agreement had not taken his grievance to the NLRB.[76]

The Court of Appeals' decision below requiring Kaiser Steel to comply with a hot cargo clause that Congress has outlawed does not square with the plain language or the legislative history of the statute or with this Court's decisions in *National Woodwork* and *Connell*. This suit is precisely the kind of enforcement action that Section 8(e) proscribes.

2. *In Any Event, Federal Courts Have Jurisdiction To Decide Labor Law Issues in Cases Properly Before Them on Other Grounds.*

The Court of Appeals' decision not only misconstrues Section 8(e) itself, but also runs afoul of a more general principle, manifest in a long line of decisions, that the doctrine of primary NLRB jurisdiction does not prevent a federal court from deciding labor law issues that arise in actions, like this one, "brought under independent federal remedies." *Connell Construction Co. v. Plumbers & Steamfitters Local 100, supra*, 421 U.S. at 626 (footnote omitted).[77] Indeed, in *Connell* the Supreme Court—far from deferring to any exclusive NLRB jurisdiction—decided in the first instance the very issue that the Court of Appeals here said federal courts may not consider: whether a contract clause violates Section 8(e).[78]

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[76] *Frito-Lay, Inc. v. Retail Clerks Local 7*, 629 F.2d 653 (10th Cir. 1980).

[77] *See also Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965).

[78] In *Connell*, an employer filed suit against a union challenging a contract between them under the Sherman Act. The employer could have, but did not, file a complaint with the NLRB claiming that the contract violated Section 8(e). Nevertheless, in order to decide whether the contract violated the Sherman Act, the Court had to determine whether the clause comported with Section 8(e) and was therefore immune from antitrust scrutiny. The Supreme Court decided that question and held that the clause violated Section 8(e) and thus was not immune from scrutiny under the Sherman Act. 421 U.S. at 626, 634.

Had Kaiser Steel sought a declaratory judgment that the purchase-of-coal clause violates the Sherman Act, as the Court of

In other cases, too, this Court has repeatedly made clear that the exclusive jurisdiction doctrine is inapplicable to a case, like this case, that was brought under Section 301 of the LMRA. In *Vaca v. Sipes*, 386 U.S. 171 (1967), for example, the Court said that the doctrine of exclusive NLRB jurisdiction has "no application to § 301 suits." [79] Similarly, in *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 245 n.5 (1962), the Court held that the exclusive jurisdiction doctrine "is inapplicable" to suits brought under Section 301; and in *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 101 n.9 (1962), it held that the exclusive jurisdiction doctrine "is not relevant" to "a suit for violation of a collective bargaining contract." [80]

The lower courts, too, have recognized that federal courts have jurisdiction to decide labor law issues that arise in contract enforcement actions otherwise properly before them. As noted, the majority of the courts that have faced the issue have held that federal courts have jurisdiction to decide issues under Section 8(e) that

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Appeals said it should have done, then under *Connell*, the court would have had to do precisely what the Court of Appeals in this case said it had no power to do: examine in the first instance the legality of the purchase-of-coal clause under the LMRA in order to decide whether the clause is immune from antitrust scrutiny.

[79] 386 U.S. at 184. In *Vaca*, a discharged employee sued his union for breach of its duty of fair representation. The Court held that, even though the alleged breach constituted an unfair labor practice, "the jurisdiction of the courts" is not "destroyed by the fact that the employee . . . finds it necessary *to prove an unfair labor practice by the union* . . . ." *Id.* at 186 (emphasis added).

[80] *See also Motor Coach Employees v. Lockridge*, 403 U.S. 274, 300 (1971). The legislative history of Section 301 of the LMRA makes clear the congressional intent that, "[o]nce parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board." Conf. Rep. No. 510 on H.R. 3020, 89th Cong., 1st Sess. 42 (1947). *See United Ass'n of Journeymen & Apprentices v. Local 334*, No. 80-710, slip op. at 12 (S. Ct. June 22, 1981); *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 513 (1962).

arise in cases properly before them on other grounds.[81] The lower courts have reached the same result in connection with other labor law issues. The Second Circuit, for example, recently held that a federal court may decide whether a contract clause violates Sections 8(a)(3) and 8(b)(2) of the LMRA in an action brought to enforce an arbitration award, even though the NLRB had never been asked to find the clause illegal.[82] The First Circuit has affirmed a district court's refusal to enforce a union security and arbitration clause in a collective bargaining agreement on the ground that enforcement would involve a violation of Section 8(a) of the LMRA.[83] And in another case, it observed:

> "If a complaint under § 301 is predicated upon the breach of a term of a collective bargaining agreement which the Congress has forbidden to be included in such an agreement, the federal court must necessarily hold such term invalid, and deny recovery thereon, . . ." [84]

The lesson of these cases is that federal courts may decide labor law questions when they arise as a collateral matter in actions otherwise properly before the courts and may, in particular, decide whether contract clauses they are asked to enforce violate Section 8(e). Otherwise, the courts would be unable fully to resolve cases properly before them.

Federal court jurisdiction over the Section 8(e) issue in cases like this not only is necessary to enable the lower courts fully to resolve contract enforcement actions before them, but also will not undermine any of the in-

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[81] *See* pp. 39-41, *supra*.

[82] *Perma-Line Corp. v. Sign Pictorial & Display Local 230*, 639 F.2d 890 (2d Cir. 1981).

[83] *Local 1898, IAM v. Brake and Elec. Sales Corp.*, 297 F.2d 590 (1st Cir. 1960).

[84] *International Bhd. of Teamsters Local 25 v. W. L. Mead, Inc.*, 230 F.2d 576, 581 (1st Cir.), *dismissed per stipulation*, 352 U.S. 802 (1956).

terests on which the NLRB exclusive jurisdiction doctrine is based. Federal courts are "not without experience" [85] in determining whether contract clauses violate Section 8(e). Indeed, the central question raised by the Section 8(e) defense in this case—whether the boycott that the purchase-of-coal clause was intended to induce serves union objectives outside the employer's work unit—is identical to that which federal courts are empowered to decide under Sections 8(b)(4)(B) and 303 of the LMRA, 29 U.S.C. §§ 158(b)(4)(B) and 187.[86] Thus, "it is safe to presume that judicial supervision will not disserve the interests promoted by the federal labor statutes." [87]

3. *As Construed by the Court of Appeals, the LMRA Would Unconstitutionally Intrude Upon the Ability of Federal Courts To Decide Contract Enforcement Actions.*

The Court of Appeals' construction of Section 8(e) raises a serious constitutional question. As construed by the Court of Appeals, the LMRA unconstitutionally intrudes upon the federal courts' ability to decide contract enforcement actions over which Congress gave them jurisdiction and thus offends the constitutional requirement of the separation of powers. This constitutional problem further demonstrates that the Court of Appeals' construction of the LMRA is erroneous.

The parties and the lower courts in this case agree that the district court had jurisdiction to entertain

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[85] *Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 686 (1965).

[86] Section 8(b)(4)(B) provides—in language virtually identical to that used in Section 8(e)—that it shall be an unfair labor practice for a union to induce an employer to cease doing business with any other person. 29 U.S.C. § 158(b)(4)(B). Federal courts are expressly empowered under Section 303 of the LMRA, 29 U.S.C. § 187, to hear suits for damages brought by anyone alleging injury from a violation of Section 8(b)(4)(B), regardless whether the NLRB has previously had an opportunity to resolve the dispute.

[87] *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 297-98 (1971). *See also Farmer v. United Bhd. of Carpenters & Joiners Local 25*, 430 U.S. 290, 297 (1977).

Respondents' action under Section 301 of the LMRA. That section vests in the district courts jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization . . . ." 29 U.S.C. § 185, According to the Court of Appeals, however, a federal court may determine in a Section 301 action only "what a particular contract provision means and whether its obligations have been fulfilled"; whether the contract clause violates Section 8(e), the Court said, is for the NLRB to decide.[88]

But the NLRB is under no obligation to examine a contract provision that is alleged to violate Section 8(e), even on request of a party to the contract like Kaiser Steel. Indeed, as the Court of Appeals recognized, a decision by the general counsel of the NLRB not to commence an enforcement proceeding in response to an employer's complaint challenging the lawfulness of a hot cargo clause is not reviewable by any court.[89]

Thus, by holding that a federal court may not determine the lawfulness of a contract clause under Section 8(e) in an enforcement action under Section 301, the court has left employers like Kaiser Steel with the prospect that they may be compelled to comply with a contract clause the lawfulness of which *no court* has been able to review. The Court of Appeals' decision also means that a federal court must, pursuant to Section 301 of the LMRA, enforce an illegal hot cargo clause even though *neither it nor any other court* has ever been able to pass on the lawfulness of the clause.

Construing the LMRA in this way, both to empower the federal courts to enforce collective bargaining agreements and to deny them the power to determine the legality of the agreements they are called upon to enforce, raises a serious constitutional question. That question has not, to be sure, been the subject of widespread

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[88] 642 F.2d. at 1315; Pet. App. 23a-24a.

[89] 642 F.2d at 1318; Pet. App. 31a. *See, e.g., Vaca v. Sipes, supra,* 386 U.S. at 182.

litigation. But it has been clear for over a hundred years that Congress may not grant a federal court jurisdiction to decide a case and then tell it how to decide,[90] and Article III of the Constitution has long been understood to prohibit statutes that withdraw controlling questions of law from federal enforcement courts.[91]

The Court of Appeals' construction of the LMRA runs afoul of these principles and renders the statute unconstitutional.[92] In the absence of a compelling showing in the LMRA or its legislative history that Congress

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[90] *E.g., United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872).

[91] *See, e.g., De Magno v. United States*, 636 F.2d 714, 725 (D.C. Cir. 1980) (to permit an agency "to enlist the coercive power of the courts to enforce a money judgment against an individual without the basis of the . . . claim ever being subject to judicial scrutiny . . . is contrary to the very notion of an ordered government of checks and balances"); *United States v. Howard*, 440 F. Supp. 1106 (D. Md. 1977), *aff'd on other grounds*, 590 F.2d 564 (4th Cir.), *cert. denied*, 440 U.S. 976 (1979). *Cf. Bob Jones Univ. v. Simon*, 416 U.S. 725, 746 (1974).

As Professor Hart put it in his famous "Dialogue":

> "Name me a single Supreme Court case that has squarely held that, in a civil enforcement proceeding, questions of law can be validly withdrawn from the consideration of the enforcement court where no adequate opportunity to have them determined by a court has been previously accorded. When you do, I'm going back to re-think *Marbury v. Madison*."

Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1378-79 (1953), *reprinted in* H. Hart and H. Wechsler, The Federal Courts and the Federal System 341 (2d ed. 1973) (footnote omitted).

[92] At the very least, the Court of Appeals' construction presents a substantial constitutional question. Professor Van Alstyne has described that question as follows:

> "If Congress may not instruct the Supreme Court on how to decide a case or controversy or on what results to reach or what decision to make, then it is arguable that legislation that permits a case to be brought to the Court but prunes away only certain kinds of issues may have the effect of mandating the outcome of the case. . . . It is arguable therefore that even assuming Congress may restrict the appellate jurisdiction of

intended to bar a court from considering the legality of contracts it is called upon to enforce, the statute should not be read to produce that result.[93]

III. THE COURT OF APPEALS ERRED IN AWARDING ATTORNEYS' FEES BECAUSE NO APPLICABLE STATUTE PROVIDES FOR SUCH AN AWARD.

Since this Court's decision in *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240 (1975), it has been clear that federal courts may not award attorneys' fees unless authorized to do so by statute. The courts below, however, failed to heed *Alyeska* and awarded attorneys' fees even though no applicable statute provides for such an award.

Respondents' complaint alleged a single cause of action—failure by Kaiser Steel to comply with the 1974 collective bargaining agreement—and properly claimed jurisdiction under Section 301 of the LMRA. That section provides jurisdiction in actions brought to enforce collective bargaining agreements. It does not, however, authorize an award of attorneys' fees.[94]

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the Supreme Court it may not do so on the basis of merely selecting certain kinds of issues to withdraw from consideration rather than acting to withdraw whole cases. . . . [T]o the extent the case is permitted to be heard by the Court but [the Court] is forbidden to decide it on the basis of certain things it produces the net effect of directing the outcome of the case or controversy itself, and in my mind at least it raises a substantial question about the separation of powers . . . ." Hearings Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, 90th Cong., 2d Sess. 173 (1968).

[93] *See, e.g., NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979) ("an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available"); *Rail Reorganization Act Cases*, 419 U.S. 102, 134 (1974) (statutory construction "should go in the direction of constitutional policy"), *quoting United States v. Johnson*, 323 U.S. 273, 276 (1944).

[94] *E.g., General Tel. Co. v. International Bhd. of Elec. Workers Local 89*, 554 F.2d 985, 987 (9th Cir. 1977); *National Ass'n of Letter Carriers v. United States Postal Serv.*, 590 F.2d 1171, 1176 & n.5 (D.C. Cir. 1978); *Western Elec. Co. v. Communi-*

Respondents also claimed jurisdiction under Section 502 of ERISA, 29 U.S.C. § 1132 (1976). But, while Section 502(g) does give federal courts jurisdiction to award attorneys' fees in actions arising under ERISA, this is not such an action.[95]

Section 502 provides jurisdiction only over actions brought to enforce either ERISA itself or the provisions of a pension plan.[96] But this action was brought only to enforce a collective bargaining agreement.

Respondents did not allege that Kaiser Steel violated the terms of a pension plan. Indeed, Respondents did not even put any such plan in the record. None of the plans administered by Respondents imposes any obligations on Kaiser Steel, so Respondents' suit against Kaiser Steel could not in any event have been based on a violation of a plan or brought to enforce a plan.[97]

Nor did Respondents allege that Kaiser Steel had violated any provision of ERISA itself. Until it was

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cation Equip. Workers, Inc., 554 F.2d 135, 138 (4th Cir. 1977); *International Bhd. of Elec. Workers Local 12 v. A-1 Elec. Serv. Inc.*, 535 F.2d 1 (10th Cir. 1976), *cert. denied*, 429 U.S. 832 (1976).

[95] A new subsection was added to Section 502 of ERISA by Section 306(b)(1) of the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208, which became effective on September 26, 1980, after the Court of Appeals' decision in this case. This new subsection also provides for attorneys' fees; but, like Section 502(g), which is now Section 502(g)(1), the new subsection applies only to actions brought to enforce ERISA. Thus, the new subsection too could apply to this case only if the cause of action in this case arose under ERISA.

[96] *See* Section 502(a)(3), 29 U.S.C. § 1132(a)(3).

[97] Neither of the lower courts analyzed the applicable statutes or set forth any basis for the attorneys' fee award. *See* 642 F.2d at 1320; Pet. App. 33a-34a, 69a. (For this reason alone, the award should be reversed. *See, e.g., Iron Workers Local 272 v. Bowen*, 624 F.2d 1255, 1266 (5th Cir. 1980).) The Court of Appeals did cite several earlier cases brought to collect payments owed to pension funds (642 F.2d at 1320; Pet. App. A 34a), but it is not clear from those cases what the plans at issue provided. In any event, whatever may be the case in other plans or other industries, it is clear that the plans at issue here impose no obligations on Kaiser Steel and that this case was not brought to enforce any plan.

amended after the Court of Appeals' decision, ERISA did not require employers to make contributions to pension funds pursuant to collective bargaining agreements. No provision of ERISA was concerned with obligations of employers under such agreements.

Section 306(a) of the ERISA amendments provides a new cause of action, which became law after the Court of Appeals' decision in this case, to enforce obligations of employers to make pension fund contributions pursuant to collective bargaining agreements. 29 U.S.C. § 1145 (1981). And ERISA provides that courts may award attorneys' fees in actions arising under that new section, as well as under the other provisions of ERISA. *See* 29 U.S.C. §§ 1132(g)(1) and (2).

Respondents have argued that they are entitled to attorneys' fees as if this action had been brought under the new statute,[98] but that is not the case. Section 306(a) creates a "new statutory duty."[99] Courts do not give retroactive application to, and create liability for, new statutory duties that are established nearly three years after the conduct in question.[100] The new statute, far from aiding Respondents, proves instead that the applicable provisions of ERISA did not provide any basis for Respondents' action and, thus, that there is no basis for the award of attorneys' fees.[101]

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[98] Brief for Respondents in Opposition to Petition for a Writ of Certiorari, April 13, 1981, at 26.

[99] 124 Cong. Rec. 56588 (daily ed., May 1, 1978) (remarks of Senator Williams).

[100] This is especially true if, as Respondents argue is the case with Section 306(a), the new statute effects a substantial change in the requirements of the law. *See, e.g., Greene v. United States*, 376 U.S. 149, 160 (1964); *Union Pac. R. Co. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913); *see also Bradley v. Richmond School Board*, 416 U.S. 696, 721 (1974).

[101] *See* 1A Sutherland Statutes and Statutory Construction 178 (C. Sands ed. 1972) (it can be inferred from the enactment of a new amendment that its requirements were not included in the original act and that Congress "intended to change the original act by creating a new right").

CONCLUSION

For the foregoing reasons, the Court of Appeals' decision should be reversed, and the case should be remanded for further proceedings to determine whether the purchase-of-coal clause is illegal.

Respectfully submitted,

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